IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA.

RSA No. 231 of 1998.

Date of Decision: **August 22, 2006**.

Chander Shekhar and another .....Appellants.

Versus

Uma Datt and another .....Respondents.

Coram

The Hon'ble Mr. Justice V.K. Gupta, Chief Justice.

Whether approved for reporting?[1]

For the Appellants: Mr. Kuldip Singh, Sr. Advocate with Mr. Karan Singh, Advocate.

For the Respondents: Mr. Navlesh Verma, Advocate.

V.K. Gupta, C. J. (Oral):

Appellants are the plaintiffs and the respondents are the defendants. The suit was filed by the appellants- plaintiffs in the Court of Sub Judge 1st Class, Court No.2, Paonta Sahib, wherein it was prayed that a decree for possession of the portion of the house being the subject matter of the suit by ejecting the defendants from the said premises be passed in favour of the plaintiffs- appellants and against the defendants-respondents. The basis of making such prayer for passing such decree for possession was the alleged execution of a Will on 13th August, 1986 by

[1] Whether Reporters of Local Papers may be allowed to see the judgment?

late Babu Ram Shastri, testator who died at Paonta Sahib on 28th October, 1991. The appellants' claim in the suit was that the testator before his death had executed the aforesaid Will on 13th August, 1986, which was registered in the office of Sub Registrar, Paonta Sahib on the same day, whereby, besides distributing his other properties he had bequeathed the house in question in favour of the plaintiffs to the exclusion of everybody except the limited inclusion of his wife Smt. Saroj to the extent that she was allowed right of residence in the said house during her life-time.

The suit was resisted by the defendants- respondents. The factum of the execution of the Will by the testator on 13th August, 1986 was denied by the defendants and it was pleaded by them that this was a result of fraud, misrepresentation and forgery. It was also pleaded in the written statement filed in answer to the suit that on 26th September, 1992 the plaintiffs had executed an agreement in favour of the defendants wherein and whereby they had agreed to pay Rs.75,000/- to the defendants within a period of two years from the date of execution of the agreement. This agreement also stipulated that if this payment was not made the defendants would be deemed to be the owners of the suit property as the plaintiffs would admit them as such owners. Copy of this agreement was produced in the trial Court and has been exhibited as Ex.D-1 therein.

Based upon the pleadings of the parties, the following nine issues were framed for trial by the learned trial Court:-

1. Whether late Shri Babu Ram executed Will dated 13.8.1986 in favour of the plaintiffs? …OPP.

2. If issue No.1 is proved in affirmative, whether plaintiffs are entitled for the recovery of possession as prayed? …OPP

3. Whether plaintiffs are entitled for the mesne profits, as prayed? ….OPP.

4. Whether late Shri Babu Ram created the permanent irrevocable licence in favour of the defendants as claimed? …OPD

5. Whether plaintiffs are restrained from filing to the present suit due to their own act, conduct and acquiescence? ..OPD

6. Whether there is no cause of action? ….OPD.

7. Whether the suit is bad for non joinder of necessary parties? ….OPD..

8. Whether suit is properly valued? ….OPP.

9. Relief.

Learned trial Court decided all the issues in favour of the plaintiffs especially the all important issue relating to the execution of the Will dated 13th August, 1986, being Issue No.1 and passed the decree for possession in favour of the plaintiffs after the ejectment of the defendants from the suit property. Defendants were directed to hand over the possession of the suit property to the plaintiffs at once. The plaintiffs' claim for grant of mesne profit, however, was not allowed. Aggrieved, the defendants preferred a Regular First Appeal against the aforesaid judgment and decree. The learned Additional District Judge, Sirmaur District at Nahan, vide his judgment and decree dated 1st May, 1998 passed in Civil Appeal No.25-N/13 of 1995 by setting aside the judgment and decree passed by the learned trial Court remanded the case to the learned trial Court with two fold directions; firstly, to take the amended plaint from the plaintiffs-appellants impleading Smt. Saroj the widow of the testator and thereafter to obtain from her written statement and then to try the suit afresh, and secondly, to frame necessary issues with regard to the aforesaid agreement dated 26th September, 1992 (Ex.D-1), also take

additional evidence if required and decide the case afresh in accordance with law.

The appellants have assailed the aforesaid impugned judgment and decree of the learned Additional District Judge on a number of grounds.

After hearing the learned counsel for the parties at length and on perusal of the impugned judgment of the learned Additional District Judge as well as the judgment of the learned trial Court, I feel convinced that the learned Additional District Judge erred on two counts; firstly, he ought to have himself, exercising his jurisdiction as the first appellate Court under Section 96 read with Order 41 CPC, on a proper appreciation of evidence, decided all the issues in the case, especially the all important issue, being issue No.1 relating to the execution of the disputed Will, and in the process to up-hold or reverse the findings returned on these issues by the learned trial Court. A perusal of the impugned judgment does clearly reveal that the learned Additional District Judge did not do so. Secondly, he also fell in error by remanding the case to the learned trial Court for framing of an additional issue with respect to the agreement dated 26th September, 1992 (Ex.D-1). Since the agreement was already on the file of the trial Court, it having been duly exhibited, the learned Additional District Judge while exercising his jurisdiction as first appellate Court ought to have decided the effect of the agreement himself because the execution of the agreement had not been disputed by the plaintiffs.

I need not dwell upon the aspect relating to the impleadment of Smt. Saroj as a defendant in the suit on the so-called ground that she was a necessary and proper party because the learned counsel for the parties have informed me today that Smt.Saroj has since passed away. According

to them, she died in the year 1999. The learned counsel for the parties agree that the couple namely, the testator and Smt.Saroj did not have any children. Even otherwise, on a proper appreciation of the facts and circumstances of the case especially in the background of the evidence led in the trial Court, I feel convinced that Smt.Saroj was not a necessary party in the suit because she was present at the time of the attestation of the mutation in favour of the appellants based upon the aforesaid disputed Will. Primarily since she has now died, the question of her impleadment now has lost all relevance.

Based upon the aforesaid reasoning, I set aside the impugned judgment and decree of the learned Additional District Judge passed on 1st May, 1998 and remit the matter to him for re-deciding the first appeal in the light of, and based upon the following directions:-

(1) He shall pass an appropriate judgment exercising his jurisdiction as a first appellate Court, by a proper appreciation of evidence, with respect to the findings returned by learned trial Court on all the issues.

(2) In the process he shall himself decide whether the agreement dated 26th September, 1992, admitted to have been executed by the appellants-plaintiffs, has or had any relevance to the issues involved and to the property as well as the rights and obligations of the parties upon the said property and as to whether this agreement by itself conferred or vested any right, without any further or additional availing of remedies by the defendants-respondents, qua the property in question.

(3) The parties submit and undertake before me that they shall not be producing any additional evidence for the adjudication of the aforesaid question relating to the aforesaid agreement by the learned Additional District Judge.

The appeal allowed to the aforesaid extent. The matter being remitted to the learned Additional District Judge, Sirmaur District at Nahan, the parties through their learned counsel are directed to appear before him on 14th September, 2006. Since the matter has already been inordinately delayed, I direct that the appeal shall now be disposed of latest by 30th November, 2006. No orders as to costs.

August 22, 2006. **(V.K. Gupta), C.J.**
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